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A

AmBank (M) Bhd v Messrs Abd Gani Che Man

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–515–03 OF 2012
AZIAH ALI, ZAWAWI SALLEH AND UMI KALTHUM JJCA
23 JUNE 2014

C *Tort — Negligence — Duty of care — Solicitors' duty of care — Solicitors appointed by bank to handle documentation of loan transaction — Housing loan facilities granted to borrower — Solicitors gave confirmation to bank that all legal documentations was in order — Discovery that borrower and borrower's alleged solicitor was same person — Whether instruction for verification of authenticity of*
D *documents given by bank to solicitors — Claim for damages — Whether solicitors negligent in discharge of duty of care*

The appellant had appointed the respondent as its solicitors to handle the documentation for a loan transaction. The third party in the High Court
E ('Ahmad'), at the material time, was a partner at the respondent firm who had handled the matter. The appellant had agreed to grant housing loan facilities to one Sim ('the borrower') to purchase two apartment units from the vendor. The appellant then instructed the respondent to act on behalf of the appellant in the security documentation of the loan which the respondent obligingly did. The
F respondent then sent a letter to the appellant on 23 May 2001 confirming that all legal documentation was in order and further advised the appellant that it was in order for the appellant to release through the respondent, the loan amount in favour of the solicitors acting for the borrower ('KY Lee'). As requested by KY Lee, the respondent then deposited the two demand drafts
G into KY Lee's client account. The borrower defaulted on the loan repayment and letters of demand were sent by the appellant's solicitors to the borrower. The appellant was unable to foreclose the properties. Investigations by the appellant revealed that the borrower and the borrower's purported solicitor was one and the same person. The solicitor was also not a registered member of the
H Malaysian Bar and there was no record of the identity card number of the borrower at the National Registration Department. The appellant claimed against the respondent for damages for negligence in the discharge of its duty of care as solicitors. In turn, the respondent counterclaimed for indemnity against the third party. The judicial commissioner ('JC') accepted the
I testimony of the third party, that he had verified that the properties were free from encumbrances and had also verified that the borrower was not a bankrupt at the material time. The JC found that the respondent had prepared all the loan documentation in accordance with all the requirements found in the check list provided by the appellant to the respondent. It was the finding of the

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JC that the appellant's instructions to the respondent did not include the verification of the authenticity of the documents. The JC found that the appellant had failed to prove that the respondent was negligent. The appellant's claim was therefore dismissed and the respondent's claim for indemnity against the third party was also accordingly dismissed. Dissatisfied with the decision of the High Court, the appellant appealed and raised the issued of whether the respondent had acted negligently in the discharge of its duties as the appellant's solicitors in the preparation of the loan documentation; and whether the respondent was negligent in advising the appellant to release the loan monies to the borrower's solicitors contrary to cl 4 of the sale and purchase agreement ('SPA').

Held, allowing the appeal:

(1) The respondent was not negligent in the preparation of the loan documentation but was negligent in advising the appellant to release the loan amount in favour of the borrower's solicitors notwithstanding that cl 4 of the SPA specifically provided that the purchase price was to be paid to the vendor (see para 12).

(2) The JC had not made any finding on the appellant's claim that the respondent was negligent in giving its advice for the appellant to release the loan sum in favour of the borrower's solicitors (see para 16).

(3) A perusal of the various letters written by KY Lee to the respondent appeared genuine and were nothing out of the ordinary such as to arouse any suspicion that the writer was not a conveyancing solicitor but a fraudster or that the transaction was fraudulent. Nevertheless cl 4 of the SPA specifically stated that the loan sum was to be released to the vendor. By advising the appellant to release the loan sum to the borrower's solicitor, the respondent had acted negligently by giving advice that was clearly contrary to the contractual provision even though it was the respondent's opinion that it was safe to do so since the demand drafts were to be paid into KY Lee's clients' account (see para 18).

(4) The respondent was negligent in giving advice to the appellant that was contrary to the contractual provisions. The respondent's advice proved detrimental to the interests of the appellant and had caused loss of the loan sum of RM193,200, an amount that was not disputed (see para 19).

[Bahasa Malaysia summary

Perayu melantik responden sebagai peguamcaranya untuk mengendalikan dokumen bagi transkasi pinjaman. Pihak ketiga di Mahkamah Tinggi ('Ahmad'), pada masa material, adalah rakan kongsi di firma responden yang mengendalikan perkara tersebut. Perayu telah bersetuju untuk memberikan kemudahan pinjaman perumahan kepada seorang yang bernama Sim ('peminjam') untuk membeli dua unit pangsapuri daripada penjual. Perayu

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kemudiannya mengarahkan responden untuk bertindak bagi pihak perayu dalam dokumen jaminan pinjaman tersebut yang mana responden dengan rela melakukannya. Responden kemudiannya menghantar surat kepada perayu pada 23 Mei 2001 mengesahkan bahawa kesemua dokumen undang-undang adalah teratur dan menasihatkan perayu selanjutnya bahawa adalah untuk perayu melepaskan melalui responden, jumlah pinjaman memihak peguamcara yang tertindak untuk peminjam ('KY Lee'). Seperti yang dipohon oleh KY Lee, responden kemudiannya mendepositkan dua draf tuntutan ke dalam akaun pelanggan KY Lee. Peminjam mengingkari pembayaran balik dan surat tuntutan dihantar oleh peguamcara perayu kepada peminjam. Perayu tidak dapat untuk merampas hartanah tersebut. Siasatan oleh perayu menunjukkan bahawa peminjam and peguamcara peminjam adalah orang yang sama. Peguamcara juga bukan ahli berdaftar Majlis Peguam Malaysia dan tidak terdapat rekod nombor kad pengenalan peminjam di Jabatan Pendaftaran Negara. Perayu menuntut terhadap responden untuk ganti rugi bagi kecuaian dalam menjalankan tugasnya sebagai peguamcara. Sebaliknya, responden menuntut balas untuk indemniti terhadap pihak ketiga. Pesuruhjaya kehakiman ('PK') menerima keterangan pihak ketiga, bahawa dia telah mengesahkan bahawa hartanah bebas daripada halangan dan juga telah mengesahkan bahawa peminjam bukan bankrap pada masa material. PK mendapati bahawa responden telah menyediakan kesemua dokumen pinjaman mengikut kesemua keperluan yang didapati di dalam senarai semak yang diberikan oleh perayu kepada responden. Adalah dapatan PK bahawa arahan perayu kepada responden tidak termasuk pengesahan ketulenan dokumen. PK mendapati bahawa perayu gagal untuk membuktikan bahawa responden adalah cuai. Tuntutan perayu oleh itu ditolak dan tuntutan responden untuk indemniti terhadap pihak ketiga juga oleh itu ditolak. Tidak berpuas hati dengan keputusan Mahkamah Tinggi, perayu merayu dan membangkitkan isu sama ada responden bertindak secara cuai dalam menjalankan tugasnya sebagai peguamcara perayu dalam menyediakan dokumen pinjaman; dan sama ada responden adalah cuai dalam menasihatkan perayu untuk melepaskan wang pinjaman kepada peguamcara peminjam bertentangan klausa 4 perjanjian jual beli tersebut ('PJB').

Diputuskan, membenarkan rayuan:

(1) Responden tidak cuai dalam menyediakan dokumen pinjaman tetapi cuai dalam menasihatkan perayu melepaskan jumlah pinjaman memihak peguamcara peminjam walaupun klausa 4 PJB secara khas memperuntukkan bahawa harga belian hendaklah dibayar kepada penjual (lihat perenggan 12).

(2) PK tidak membuat apa-apa dapatan atas tuntutan perayu bahawa responden adalah cuai dalam memberikan nasihatnya untuk perayu melepaskan jumlah pinjaman memihak peguamcara peminjam (lihat perenggan 16).

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(3) Penelitian ke atas pelbagai surat yang ditulis oleh KY Lee kepada responden nampaknya asli dan bukan luar biasa seperti untuk menimbulkan apa-apa rasa syak bahawa penulis bukan peguamcara pemindahakkan tetapi adalah penipu atau transaksi tersebut adalah palsu. Walau bagaimanapun klausa 4 PJB secara khas menyatakan bahawa jumlah pinjaman hendaklah dilepaskan kepada penjual. Dengan menasihatkan perayu untuk melepaskan jumlah pinjaman kepada peguamcara peminjam, responden telah bertindak secara cuai dengan memberikan nasihat yang jelas bertentangan kepada peruntukan kontraktual walaupun ia adalah pandangan responden bahawa adalah selamat untuk berbuat demikian memandangkan draf tuntutan hendaklah dibayar ke dalam akaun pelanggan KY Lee (lihat perenggan 18).

(4) Responden adalah cuai dalam memberikan nasihat kepada perayu yang bertentangan kepada peruntukan kontraktual. Nasihat responden dibuktikan memberi kesan mudarat kepada kepentingan perayu dan telah menyebabkan kerugian jumlah pinjaman sebanyak RM193,200, jumlah yang tidak dipertikaikan (lihat perenggan 19).]

Notes

For cases on duty of care, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1248–1334.

Cases referred to

Neogh Soo Oh & Ors v G Rethinasamy [1984] 1 MLJ 126; [1983] 2 CLJ 218; [1983] CLJ (Rep) 663 (refd)

Yap Ham Seow v Fatimawati bt Ismail & Ors and another appeal [2014] 1 MLJ 645; [2013] 9 CLJ 577, CA (refd)

Appeal from: Civil Suit No 57–22–9 of 2007 (High Court, Kuala Lumpur)

Raiza bt Zakaria (Albar & Partners) for the appellant.
Stanislaus (M S Vethanayagam & Assoc) for the respondent.

Aziah Ali JCA (delivering judgment of the court):

[1] The appellant, AmBank (M) Bhd ('the plaintiff in the court below') had appointed the respondent, Messrs Abd Gani Che Man & Co ('the defendant in the court below'), as its solicitors to handle the documentation for a loan transaction. The third party in the court below, Ahmad Arshad bin Yahaya was, at the material time, a partner in the respondent firm who had handled the matter.

[2] The appellant had agreed to grant housing loan facilities to one Sim Ban

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Ee ('the borrower') for the total sum of RM193,200 ('the loan sum') to purchase two apartment units in a project known as 'Seri Indah Apartment' in Penang ('the properties') from the vendor, Metro Development Sdn Bhd ('the vendor'). The developer of the properties was Lip Sin Co Sdn Bhd ('the developer'). The offer was accepted by the borrower (p 376 of the appeal record). This was followed by a letter dated 16 April 2001 from the appellant to the respondent instructing the respondent to act on the appellant's behalf in the security documentation of the loan (p 287 of the appeal record).

[3] The appellant's letter dated 16 April 2001 to the respondent reads, inter alia, as follows:

ABD. GHANI CHE MAN & CO. (SHAH ALAM)

ADVOCATES & SOLICITORS

NO. 31 TINGKAT 2

JALAN TENGKU AMPUAN ZABEDAH B 9/B

SECTION 9 SHAH ALAM

40100 SELANGOR

Our ref: R/017/HL/009454/01

Dear Sirs

HOME LOAN OF RM193,200.00

borrower(S): SIM BAN EE

CONTACT NO.: 012-6612287/03-56213028

We refer to the above matter for which you have our instruction to act on our behalf in the security documentation thereof.

We enclose herewith the following for your attention:

1. AMBB Documentation Checklist ('ADC')

2. Letter of Offer dated 05/04/2001

3. Composite Loan Agreement cum Assignment (4 copies) Together

with Power of Attorney (4 copies)

(Printing Charges applicable RM100)

Other instructions: PRIVATE CAVEAT IS NOT APPLICABLE.

PLEASE OBTAIN ORIGINAL SPA FROM borrower.

PLEASE FORWARD P/COPY SPA

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DURING EXECUTION & ORIGINAL SPA
DURING ADVICE.

We look forward to your expeditious attendance hereof.

Yours faithfully

for ARAB-MALAYSIAN BANK Bhd

NOR IDAYU ABDUL MALEK

RETAIL BANKING OPERATIONS

The loan documentation checklist ('the checklist') can be found at pp 237–238 of the appeal record.

[4] The respondent had sent a letter to the appellant dated 23 May 2001 confirming that all legal documentation was in order and in the same letter had advised the appellant that it was in order for the appellant to release through the respondent the loan amount in favour of Messrs KY Lee & Associates ('KY Lee'), the solicitors acting for the borrower (pp 235–236 of the appeal record). Acting on the said letter, on 28 May 2001 the appellant sent to the respondent demand drafts made in favour of KY Lee (pp 240–241 of the appeal record). As requested by KY Lee, the respondent then deposited the two demand drafts into the client's account of KY Lee (p 300 of the appeal record). This account had been opened by KY Lee at the appellant's Seberang Jaya branch in the year 2000 (p 266 of the appeal record).

[5] The borrower defaulted on the loan repayment and letters of demand were sent by the appellant's solicitors to the borrower. Unfortunately the appellant was not able to foreclose on the properties. Investigations by the appellant revealed that the borrower, Sim Ban Ee and the borrower's purported solicitor, Lee Kon Yew, was one and the same person (pp 247 & 506 of the appeal record). The appellant further discovered that the said Lee Kon Yew was not a registered member of the Malaysian Bar (p 244 of the appeal record). Investigations also revealed that the National Registration Department has no record of the identity card number of Sim Ban Ee. Hence, the evidence showed that the appellant had been a victim of fraud perpetrated by Sim Ban Ee/Lee Kon Yew.

[6] The appellant's claim against the respondent was for damages for negligence in the discharge of its duty of care as solicitors for the appellant. The respondent in turn filed a claim for indemnity against the third party.

[7] By paras 16 and 17 of the statement of claim, the appellant alleged the following particulars of negligence against the respondent which we reproduce as follows:

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16 Oleh yang demikian, tuntutan pihak Plaintif di dalam ini adalah terhadap kecuaian ('negligence') oleh pihak Defendan, di mana butir-butir terperinci kecuaian tersebut adalah seperti berikut:

(i) Pihak Defendan sewajar dan seharusnya mengetahui tetapi telah gagal dan/atau cuai di dalam melaksanakan tugasnya dengan usaha yang wajar ('due diligence') apabila gagal membuat carian di Jabatan Pendaftaran Negara dan Jabatan Pemegang Harta berkenaan dengan status Peminjam dengan sempurna sebelum penyediaan Perjanjian Pinjaman tersebut;

(ii) Pihak Defendan sewajar dan seharusnya mengetahui tetapi telah gagal dan/atau cuai di dalam mendapatkan endorsemen persetujuan dan/atau akujanji Pemaju untuk menyerahkan hakmilik strata di dalam Perjanjian Pinjaman tersebu;

(iii) Pihak Defendan sewajar dan seharusnya mengetahui tetapi telah gagal dan/atau cuai untuk membuat carian yang sempurna dengan Pemaju, Penjual dan Pejabat Tanah berkenaan dengan status Hartanah tersebut;

(iv) Pihak Defendan sewajar dan seharusnya mengetahui tetapi telah gagal dan/atau cuai di dalam memastikan dan menentusahkan keesahan dokumen-dokumen atau suratcara yang berkenaan di dalam transaksi tersebut seperti yang diperlukan di dalam senarai semakan tersebut;

(v) Pihak Defendan sewajar dan seharusnya mengetahui tetapi telah gagal dan/atau cuai di dalam menangani risiko penyelewengan (embezzlement) oleh peguamcara Peminjam apabila melepaskan Pinjaman tersebut kepada peguamcara Peminjam dan bukannya kepada Penjual;

(vi) Pihak Defendan sewajar dan seharusnya mengetahui tetapi telah gagal dan/atau cuai di dalam menjaga dan memastikan kepentingan pihak Plaintif terjamin sepenuhnya pada setiap masa material; dan

(vii) Pihak Defendan sewajar dan seharusnya mengetahui tetapi telah gagal melaksanakan kewajipan berjaga-jaga secara professional ('professional duty of care') apabila pihak Defendan telah cuai di dalam menasihati pihak Plaintif dengan sewajarnya.

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17 Oleh yang demikian, akibat daripada kegagalan dan/atau kecuaian di atas yang mengakibatkan pelepasan wang pinjaman tersebut kepada Peminjam, pihak Plaintif telah mengalami kerugian.

[8] Premised on the alleged negligence, vide para 19 of the statement of claim the appellant prayed for the following reliefs:

(i) *ganti rugi khas sebanyak RM193,200;*

(ii) *ganti rugi am;*

(iii) *faedah ke atas perenggan-perenggan (i) dan (ii) di atas dikira pada kadar 8% setahun dari tarikh penghakiman sehingga ke tarikh penyelesaian penuh;*

(iv) *kos; dan*

(v) *sebarang relif yang dianggap suai manfaat oleh Mahkamah yang mulia ini.*

DECISION OF THE HIGH COURT

[9] The learned JC accepted the testimony of SD3, the third party, that he had verified that the properties were free from encumbrances and had also verified that the borrower was not a bankrupt at the material time. The learned JC found that the respondent had prepared all the loan documentation in accordance with all the requirements found in the check list provided by the appellant to the respondent. It was the finding of the learned JC that the appellant's instructions to the respondent did not include the verification of the authenticity of the documents. The learned JC found that the appellant had failed to prove that the respondent was negligent. The appellant's claim was therefore dismissed and the respondent's claim for indemnity against the third party was also accordingly dismissed.

[10] The appellant was dissatisfied with the decision of the High Court, hence this appeal.

THE APPEAL

[11] The issues raised by the appellant before us can be summarised as follows:

(a) whether the respondent had acted negligently in the discharge of its duties as the appellant's solicitors in the preparation of the loan documentation; and

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(b) whether the respondent was negligent in advising the appellant to release the loan monies to the borrower's solicitors contrary to cl 4 of the sale and purchase agreement ('S&P').

[12] Having heard the submissions, we disagreed with the appellant on the first issue that the respondent was negligent in the preparation of the loan documentation. However, we agreed with the appellant on the second issue that the respondent was negligent in advising the appellant to release the loan amount in favour of the borrower's solicitors notwithstanding that cl 4 (p 354 of the appeal record) of the sale and purchase agreement ('S&P') specifically provided that the purchase price was to be paid to the vendor.

[13] Consequently we unanimously allowed the appeal and set aside the judgment of the High Court. We allowed the appellant's claim for special damages in the sum of RM193,200 as prayed for in para 19(i) and for interests as prayed for in para 19(iii) of the statement of claim. We ordered general damages as prayed for in para 19(ii) to be assessed. Costs of RM 10,000 was awarded to the appellant and the deposit was ordered to be refunded.

[14] The respondent has filed a notice of motion to the Federal Court seeking leave to appeal. Bearing in mind that our decision on liability was based on our finding that the respondent was negligent in advising the appellant to release the loan sum to the borrower's solicitors and not to the vendor, our judgment will be confined to this finding only.

[15] Clause 4 of the S&P reads as follows (p 354 of the appeal record):

4 MODE AND MANNER OF PAYMENT

The said Purchase Price shall be paid by the Purchaser in the manner as follows:

(a) Upon the execution of this Agreement, the purchaser shall pay to the vendor a sum of *Ringgit Malaysia Thirteen Thousand and Eight Hundred (RM13,800.00)* only, the receipt of which sum the vendor hereby acknowledges being deposit towards the said Purchase Price (hereinafter called 'the Deposit Sum') as deposit and earnest money and in the event of the completion of the sale and purchase herein as part payment towards the said Purchase Price.

(b) The Balance Purchase Price of *Ringgit One Hundred And Twenty Four Thousand and Two Hundred (RM124,200.00)* only (hereinafter called *'the Balance Sum*') shall be paid by the Purchaser to the vendor within three (3) months from the date of this Agreement (hereinafter called 'the Completion Date') PROVIDED ALWAYS THAT if the Purchaser shall not be able to

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> complete the purchase on or before the Completion Date then in consideration of the vendor giving an extension of time for a further period of one (1) month from the Completion Date (hereinafter called 'the Extended Completion Date') for the completion of the purchase of the said Property, the Purchaser shall pay to the vendor agreed interest calculated at the rate of ten per centum (10%) per annum on a non-compound daily basis on the Balance Sum. The Balance Sum shall subject to Clause 15 hereof be released to the vendor pursuant to Clause 7 hereof.

[16] It is not disputed that the respondent had sent a letter to the appellant dated 23 May 2001 and had advised the appellant that it was in order for the appellant to release the loan amount in favour of KY Lee. We take note that the learned JC had not made any finding on the appellant's claim that the respondent was negligent in giving its advice for the appellant to release the loan sum in favour of the borrower's solicitors.

[17] In the case of *Yap Ham Seow v Fatimawati bt Ismail & Ors and another appeal* [2014] 1 MLJ 645; [2013] 9 CLJ 577 this court dealt with the issue of the duty of care owed by a solicitor to his client. Raus Sharif FCJ in his judgment referred to the judgment of Gunn Chit Tuan J (as he then was) in the case of *Neogh Soo Oh & Ors v G Rethinasamy* [1984] 1 MLJ 126; [1983] 2 CLJ 218; [1983] CLJ (Rep) 663 wherein His Lordship said that 'a solicitor's duty is to use reasonable care and skill in giving such advice and taking such action as the facts of a particular case demand.'

[18] In the present appeal, a perusal of the various letters written by KY Lee to the respondent appeared genuine and were nothing out of the ordinary such as to arouse any suspicion that the writer was not a conveyancing solicitor but a fraudster or that the transaction was fraudulent. Nevertheless cl 4 of the S&P specifically stated that the loan sum was to be released to the vendor. By advising the appellant to release the loan sum to the borrower's solicitor, we found that the respondent had acted negligently by giving advice that was clearly contrary to the contractual provision even though it was the respondent's opinion that it was safe to do so since the demand drafts were to be paid into KY Lee's clients' account.

[19] On the evidence we found that the respondent was negligent in giving advice to the appellant that was contrary to the contractual provisions. The respondent's advice proved detrimental to the interests of the appellant and had caused loss of the loan sum of RM193,200, an amount that was not disputed. For the reasons aforesaid we allowed the appeal.

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Appeal allowed.

Reported by Afiq Mohammad Noor